Petition

Supreme Court, U.S.
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No. 81-1830

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1981

EARL B. MILLER AND COMPANY,

Petitioner,

v.

TAYLOR HUGHES

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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April 5, 1982

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an award of attorneys' fees, made pursuant to Title 42 U.S.C. § 1988, should be proportioned to accurately reflect the extent to which a plaintiff has prevailed on the merits of his lawsuit in the District Court?

2. Whether the trial court should have considered employment opportunities of a plaintiff before the adjudged act of retaliatory discrimination as part of the plaintiff's duty to mitigate damages on an award under Section 704(a) of Title VII of the Civil Rights Act of 1964.

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OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Sixth Circuit was entered in this case on January 8, 1982. The opinion is unreported and has been attached hereto as Appendix A.

The opinion of the United States District Court for the Southern District of Ohio, Western Division, was filed on October 22, 1980, finding Petitioner liable for retaliatory discrimination. The opinion was entered by the Honorable J. Vincent Aug, Jr., United States Magistrate. The District Court order is unreported and has been attached to this brief as Appendix B. The Opinion on damages entered on January 20, 1981, is attached as Appendix C. The Final Judgment entered on January 20, 1981, is attached as Appendix D.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was filed on January 8, 1982, and mandate stay extended to April 5, 1981. This petition for certiorari is being filed within 90 days of the date on which the judgment of the Sixth Circuit was entered. This Court's jurisdiction is invoked under Title 28 U.S.C. § 1254(1).

RELEVANT FEDERAL CONSTITUTIONAL PROVISIONS AND STATUTES

Article XI, United States Constitution

"The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by a citizen of another state, or by citizens or subjects of any foreign state."

Title 28 U.S.C. § 1821

"(a) (1) Except as otherwise provided by law, a witness in attendance at any court of the United States, or before a United States Magistrate, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall be paid the fees and allowances provided by this section.

(2) As used in this section, the term "court of the United States" includes, in addition to the courts listed in section 451 of this title, any court created by Act of Congress in a territory which is invested with any jurisdiction of a district court of the United States.

(b) A witness shall be paid an attendance fee of $30 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.

(c) (1) A witness who travels by common carrier shall be paid for the actual expenses of travel on the basis of the means of transportation reasonably utilized and the distance necessarily traveled to and from such witness's residence by the shortest practical route in going to and returning from the place of attendance. Such a witness shall utilize a common carrier at the most economical rate reasonably available. A receipt or other evidence of actual cost shall be furnished.

(2) A travel allowance equal to the mileage allowance which the Administrator of General Services has prescribed, pursuant to section 5704 of title 5, for official travel of employees of the Federal Government shall be paid to each witness who travels by privately owned vehicle. Computation of mileage under this paragraph shall be made on the basis of a uniformed table of distances adopted by the Administrator of General Services.

(3) Toll charges for toll roads, bridges, tunnels, and ferries, taxicab fares between places of lodging and carrier terminals, and parking fees (upon presentation of a valid parking receipt), shall be paid in full to a witness incurring such expenses.

(4) All normal travel expenses within and outside the judicial district shall be taxable as costs pursuant to section 1920 of this title.

(d) (1) A subsistence allowance shall be paid to a witness (other than a witness who is incarcerated) when an overnight stay is required at the place of attendance because such place is so far removed from the residence of such witness as to prohibit return thereto from day to day.

(2) A subsistence allowance for a witness shall be paid in an amount not to exceed the maximum per diem allowance prescribed by the Administrator of General Services, pursuant to section 5702(a) of title 5, for official travel in the area of attendance by employees of the Federal Government.

(3) A subsistence allowance for a witness attending in an area designated by the Administrator of General Services as a high-cost area shall be paid in an amount not to exceed the maximum actual subsistence allowance prescribed by the Administrator, pursuant to section 5702(c) (B) of title 5, for official travel in such area by employees of the Federal Government.

(4) When a witness is detained pursuant to section 3149 of title 18 for want of security for his appearance, he shall be entitled for each day of detention when not in attendance at court, in addition to his subsistence, to the daily attendance fee provided by subsection (b) of this section.

(e) An alien who has been paroled into the United States for prosecution, pursuant to section 212(d) (5) of the Immigration and Nationality Act (8 U.S.C. 1182(d) (5)), or an alien who either has admitted belonging to a class of aliens who are deportable or has been determined pursuant to section 242(b) of such Act (8 U.S.C. 1252(b)) to be deportable, shall be ineligible to receive the fees or allowances provided by this section."

Title 28 U.S.C. § 1920

"A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree."

Title 42 U.S.C. § 1988

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

STATEMENT OF THE CASE

The Petition for Writ of Certiorari is directed at the opinion of the United States Court of Appeals for the Sixth Circuit filed on January 8, 1982, affirming perfunctorily and by *per curiam* opinion, the final judgment entered by the United States Magistrate for the Southern District of Ohio, Western Division, on January 20, 1981. Petitioner sought review of the order of the District Court in awarding back pay damages in that the Court did not fully consider the prior employment record of the Respondent and that the trial court erred in the award of Respondent's attorneys fees.

This lawsuit was initially begun in November, 1977, where the Respondent made a three count complaint alleging 1) that he had been laid off because of race discrimination, 2) that he had not been called back to work because of race discrimination, and 3) that he had been discriminated against on the basis of race and retaliation because he had filed a complaint with the Ohio Civil Rights Commission. Trial on the facts was heard under the United States Magistrate's Act on September 3, 1980, before the U.S. Magistrate for the Southern District of Ohio, Western Division. At this trial there was an extensive amount of cross examination dealing with the hiring and firing practices of the Petitioner. There was also testimony concerning the personal problems that Respondent had with other employees of Petitioner. During this testimony, there was a great deal of examination concerning the records and bookkeeping of the Petitioner. The Respondent also introduced two witnesses, former investigators with the Ohio Civil Rights Commission, who testified that the President of Petitioner had refused to hire Respondent back to work because Respondent had filed a complaint with the Ohio Civil Rights Commission and the local EEOC office. At the conclusion of the testimony of all parties, the court found

that there had been no discrimination in the employment termination nor in the failure to call back, but did find that there had been retaliatory discrimination in the failure to call the Respondent back to work because of his filing a complaint with the Ohio Civil Rights Commission.

On December 9, 1980, a hearing was held on damages as the Petitioner objected to the measure of damages submitted by the Respondent. The basis for the Petitioner's objection was primarily that the damages awarded by the court did not consider prior employment of the Respondent. Specifically, it was objected that the court did not consider the employment through an affirmative action program taken just three weeks after the Respondent's termination from the Petitioner. This program was exactly the same as the employment Respondent had with the Petitioner. It was established by uncontroverted testimony that the Respondent lost the job with the new employer because of time he had to serve in the Cincinnati Workhouse for failure to pay child support. Subsequent to losing that employment, the Respondent felt that he should have been called back by the Petitioner, and the reason he wasn't called back was the basis of the action. At the hearing of damages on December 9, 1980, the court found that the damages started from the time of the retaliation, April 1, 1974, and went through the period of October, 31, 1976. As the Respondent's prior employment occurred in October of 1973, it was not considered in the award of damages of back pay at 8% interest to the Respondent.

Upon the affidavit of Respondent's attorney, and over the written objection of Petitioner's counsel, the court awarded Respondent's counsel attorney fees in the amount of $10,586.70 plus costs to the Respondent. The Respondent's award, as stated in Appendix D, was $16,972.62 at 8% interest. The attorney fees in this case were calculated at the rate of $50.00 per hour for out of court time and $60.00 per hour for in court time with $5.00 per hour for law clerk

time. This was in spite of Petitioner's objection pointing to the fact that hourly rates in 1977 were not what they are in the Cincinnati area in 1980.

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE SIXTH CIRCUIT, AFFIRMING PER CURIAM THE FINAL JUDGMENT OF THE DISTRICT COURT, CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF 42 U.S.C. § 1988 WITH RESPECT TO THE CONCEPT OF PREVAILING PARTY.

Simply stated, this contention of the Petitioner as it was presented to the Sixth Circuit was that Title 42 U.S.C. § 1988 must be reasonably interpreted as requiring a District Court to award attorneys fees only to an extent fairly proportionate to the degree to which a Plaintiff has prevailed. The Sixth Circuit affirmed the District Court perfunctorily without addressing that issue, contenting itself with citing *Northcross v. Board of Education of Memphis*, City Schools, 611 F2d 624 (6th Cir. 1971). That case, in effect, allows the Plaintiff to recover attorneys fees regardless of the amount of hours spent on the issue in which the Plaintiff prevailed. In the instant case, the Respondent was able to recover the entire amount of time spent on the case in spite of the fact that the issue upon which the Respondent won was an extremely simple and brief point of fact and law. In fact, it is easily seen that the amount of time spent on the prevailing issue was less than one third of the amount of time spent in research in trial.

The Petitioner has never suggested that the Respondent should not be given any attorney fees. But on the other hand, the award of attorney fees entered by the trial court is entirely unreasonable in light of the amount of time and effort expended on that particular point of the case and the

award given in the case for the discrimination found by the court. The decision of the Sixth Circuit indeed is contrary to decisions held by the other circuits.

In accord with the Sixth Circuit is the Eighth Circuit *Brown v. Bathke*, 588 F2d 634 (8th Cir. 1978). Also in accord is the Fifth Circuit in *Jones v. Diamond*, 636 F2d 1364 (5th Cir. 1981); and possibly the 10th Circuit in *Gurule v. Wilson*, 635 F2d 782 (10th Cir. 1980). That decision though, by the 10th Circuit, remains ambiguous because it also stated that its intention was not to suggest that a court may never reduce in a proportionate fashion requested attorney fees for time spent on a substantial separate issue which does not prevail.

In accord with the contention of the Petitioner is *Nadeau v. Helgemoe*, 581 F2d 275 (1st Cir. 1978), in which the First Circuit determined that a plaintiff might be considered a prevailing party for attorney fee purposes if they succeed on any significant issue in litigation. The court went on to say,

> "However, the amount of attorney fees they receive should be based on the work performed on the issues in which they were successful . . ." Id. at 279.

The court also went on to require that plaintiffs keep careful time records to show what amount of time was spent on which issue involved in the lawsuit.

The 3rd Circuit in *Hughes v. Repko*, 578 F2d 483 (3rd Cir. 1978) directed a District Court to give a prevailing party credit only for the hours which were reasonably spent in successful claims, and that the court should determine whether it was reasonably necessary to spend that number of hours in order to perform the legal services sought. This case was cited in the brief of the Petitioner in the Sixth Circuit. The court further pointed out that the burden to establish the hours claimed reasonably necessary rested on the party seeking the attorney fees. In this case, the Respondents attorney did not request a hearing and only

submitted an affidavit. The trial court made no determination according to factors recommended for the determination of attorney fees pursuant to *Johnson v. Georgia Highway Express, Inc.*, 488 F2d 714 (5th Cir. 1974). As such, the record was insufficient to demonstrate that Respondent had shown the necessity for the attorney fees.

The Fourth Circuit also supports the Petitioners position in its case of *Morton v. Charles County Board of Education*, 373 FSupp 394 (DMd 1974); affirmed 520 F2d 871 (4th Cir. 1974). Here the court said that a factor in determining the appropriate fee is the extent to which the plaintiffs have succeeded and that time spent on unsubstantiated claims should not be compensated. 373 FSupp at 411. The Seventh Circuit has held in *Batiste v. Furnco Construction Corporation*, 503 F2d 447 (7th Cir. 1974), cert. denied 420 U.S. 928 (1975) in an action brought under Section 1981 and Title VII, that an

> "award of attorney fees can only be made to a prevailing party and as a general guideline the amount of the award should be proportionate to the extent that the party has prevailed in this suit . . ."

In *Schaeffer v. San Diego Yellow Cabs, Inc.*, 462 F2d 1002 (9th Cir. 1972) the Ninth Circuit noted that an award should be sufficient to encourage private enforcement of the Civil Rights laws but,

> "the amount of the award should also be proportionate to the extent to which the plaintiff prevails in the suit . . ." Id. at 1008.

This decision has been reaffirmed in *Sethy v. Alameda County Water District*, 602 F2d 894 (9th Cir., 1979).

This Court has recognized the conflict in the different circuit courts of appeals in that it recently granted a writ of certiorari in *Hensley v. Eckerhart*, case number 81-1244. This Court has accepted this case dealing with the issue of whether an award of attorney fees made pursuant to Title

42 U.S.C. § 1988 should be proportioned to accurately reflect the extent to which a plaintiff has prevailed on the merits of his lawsuit in District Court. As this reason for certiorari is exactly the same as sought by the attorney general of Missouri, this case being in contradiction to decisions of other courts of appeals should justify the grant of certiorari to review these judgments.

THE DECISION OF THE SIXTH CIRCUIT, AFFIRMING PER CURIAM THE FINAL JUDGMENT OF THE DISTRICT COURT, SANCTIONS SUCH A DEPARTURE BY A LOWER COURT IN THAT IT IGNORES THE RESPONDENT'S DUTY TO MITIGATE DAMAGES AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The main contention of the Petitioner as presented in this issue is that the Sixth Circuit did not follow the rule of law that states a prevailing party has a duty to mitigate damages. *Phelps Dodge Corporation v. NLRB*, 313 U.S. 177 (1944). In his opinion, the Magistrate found that the period of back pay award would be from April 1, 1974 through October 31, 1976. This did not take into consideration the job opportunity available to the Respondent shortly after his leaving the Petitioner's employment in September of 1973. Respondent was able to obtain another trainee position in an affirmative action program approximately three weeks after his leaving Petitioner's employment, but then lost his position with the new job due to absenteeism. The reason for the absenteeism being incarceration for lack of child support.

The law imposes on Respondent the duty to find work. In *NLRB v. Southern Silk Mills, Inc.*, 242 F2d 697 (6th Cir. 1957) the Sixth Circuit held that an employee has a duty to seek other suitable available employment, even though that might be at a lower rate of pay. In this case the Re-

spondent was able to obtain suitable and equal employment after leaving the employee of the Petitioner, but was unable to hold it due to his own fault.

The Magistrate held that because this happened before the time of the retaliatory discrimination in March of 1974, then it was not to be considered in the amount of damages. This does not take into consideration that had the Respondent been able to hold his job with the second employer, then the facts arising towards this lawsuit would not have occurred. As such, this goes contra to the spirit of a plaintiff's duty to mitigate his damages.

CONCLUSION

For the following reasons the Petitioner requests this Court to issue its writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully Submitted,

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APPENDIX A

No. 81-3094

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TAYLOR HUGHES,

Plaintiff-Appellee,

v.

EARL B. MILLER & COMPANY,

Defendant-Appellant.

Order

Filed January 8, 1982

Before: KENNEDY and MARTIN, Circuit Judges; and CECIL, Senior Circuit Judge.

Earl B. Miller and Co., Inc. challenges the damage award granted by the District Court upon a finding that it was liable for retaliatory discrimination under 42 U.S.C. § 2000(e). Miller argues that the plaintiff failed to take reasonable steps to mitigate the damages and that the award for attorney's fees was improperly calculated.

The District Court's determination that the plaintiff had taken reasonable steps to mitigate damages during the period of injury is a finding of fact and hence will not be disturbed unless "clearly erroneous." Fed.R.Civ.P. 52(a); *Rolfe v. County Board of Education*, 7 F.E.P. Cases 1111 (6th Cir. 1968); *Marks v. Peatter*, 633 F.2d 1122 (5th Cir. 1981) (per curiam).

This record contains sufficient evidence to support the decision of the District Court. Miller has directed us to no

evidence tending to establish that appellee failed to exercise reasonable diligence in seeking employment following the discriminatory act. Miller appears to argue that because plaintiff was intermittently employed he could have been consistently employed had he been more diligent. We are not persuaded by this logic. There is ample evidence explaining plaintiff's rate of job turnover as well as evidence depicting his continuing efforts to find work.

Furthermore, with regard to the award of attorney's fees we believe they are calculated according to the standards enunciated in *Northcross v. Board of Education of Memphis City Schools*, 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980). We find no abuse of discretion in either the hours or the fees employed in this calculation.

The judgment of the District Court is affirmed.

Entered by Order of the Court

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Clerk

APPENDIX B
United States District Court
Southern District of Ohio
Western Division

TAYLOR HUGHES,

Plaintiff,

v.

EARL B. MILLER CO.,

Defendant.

Civil No. C-1-77-672 (H) (A)

Filed October 22, 1980

OPINION AND ORDER

This civil rights case was brought by Taylor Hughes, a black citizen of the United States, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as amended (Supp. II 1972); the Thirteenth Amendment to the United States Constitution, and 42 U.S.C. § 1981. There is no dispute that plaintiff has complied with all administrative and other jurisdictional prerequisites of Title VII of the Civil Rights Act of 1964, that the jurisdiction and venue of this Court are proper, and that this case is now properly before this Court. Prior to the trial of this matter, counsel for plaintiff and defendant stipulated and agreed that all issues of this case would be tried by the U.S. Magistrate pursuant to 28 U.S.C. § 636(c). The parties further stipulated that any appeal of this matter would be to the U.S. Court of Appeals for the Sixth Circuit.

FINDINGS OF FACT

PLAINTIFF'S LAYOFF.

1. Plaintiff was employed by the defendant as a painter-trainee on June 13, 1973. Plaintiff was hired through an affirmative action program known as Prep-Jet, and continued to work for defendant until September 13, 1973, when he was laid off.

2. During his employment, there was no communication from plaintiff to defendant that he was being treated differently from any other trainee.

3. Although plaintiff cited instances when he thought he was not allowed to work long enough, this evidence is not persuasive on the issue of discrimination. Testimony by defendant's president Earl Miller and foreman, Frank Wagner show the business necessity of having men more experienced than trainees do certain tasks.

4. The Court further finds that the examples involving Richard Trout and Stan Kitz cited by plaintiff are not convincing enough to prove discrimination. The hiring of these employees after plaintiff's layoff are similarly explained by a need for experience or intervention by the union business agent. From the facts presented, the Court cannot infer that their hiring was evidence of discrimination.

5. Furthermore, the Court cannot infer that the layoff of plaintiff was an act of discrimination. The evidence showed that the plaintiff had a personality conflict with a journeyman on the G.A. Gray job, and that he left the job to talk to Earl Miller. Defendant introduced evidence to show that the painting season was winding down, and there was no other job available just then to send plaintiff. As a result, plaintiff was laid off.

6. Although there was conflicting testimony on the amount of work left to be completed on the Gray job, and

the type of work available, the Court finds that there is no direct evidence that plaintiff's layoff on September 13, 1973 was racially motivated. Indeed, the amount and type of work remaining is relevant to the issue of pretext. Pretext is not an issue because the evidence does not support an initial finding that the layoff itself was discriminatory.

REASONABLENESS OF THE OCRC CHARGE.

7. When plaintiff was laid off on September 13, 1973, he was not informed by Mr. Miller or any other agent of the defendant that it would be necessary for him to call in from time to time in order to check to see if there was work he could do. On the contrary, Mr. Miller told plaintiff that he would call plaintiff when work picked up. In the absence of such notice, it was unreasonable to expect plaintiff to know that he was expected to call in to request work.

8. In March of 1974, plaintiff heard that defendant had called Richard Trout, a white apprentice, back to work. Plaintiff had heard that Trout was a bad worker and had actually been fired. On this basis, plaintiff filed a claim of race discrimination against defendant.

9. Plaintiff had good reason to believe that he would be called back to work, as well as to believe that whites had been called back to work. For this reason, the Court finds that plaintiff had good reason to file a charge of race discrimination against defendant with the Ohio Civil Rights Commission. His charge of race discrimination, and subsequent suit regarding discriminatory treatment was therefore not frivolous, unreasonable, or without foundation.

RETALIATION.

10. On May 21, 1974, subsequent to plaintiff's filing of a charge of racial discrimination, Henry Marbley, III and T.

J. Hattersley, investigators for the Ohio Civil Rights Commission, interviewed Mr. Miller as part of their investigation. At that time, Mr. Miller told them that plaintiff had been laid off, not fired, and that had he not filed the charge of discrimination against defendant, plaintiff would have been called back to work in April or even March of 1974. Mr. Miller labeled plaintiff as a troublemaker, and said that he would have been called back, but "piss on him, there ain't no way I'd take him back now." By "troublemaker," Mr. Miller was referring to the discrimination charge.

11. Mr. Miller testified that fault in this matter lies with plaintiff, since plaintiff did not call defendant to ask for his job back. The Court is not persuaded by this argument. In his disposition of May 30, 1980, Mr. Miller indicated: "If he would have—if he would have sit tight in the boat to get a phone call from me, he probably would have been right here today. Mr. Miller confirmed the truth of that statement at the trial.

In addition, on the basis of Mr. Miller's trial testimony, the Court finds that even had plaintiff called to request his job back, defendant would not have taken plaintiff back unless the charge of discrimination was resolved first. Plaintiff was not required to make a futile gesture to prove his case.

12. Furthermore, the Court finds that defendant's refusal to recall plaintiff to work after April 1, 1974 was because of the charge of race discrimination which plaintiff had filed with the Ohio Civil Rights Commission. The Court further finds that had plaintiff not filed the charges with the Ohio Civil Rights Commission, that defendant would have recalled him to work no later than April 1, 1974.

CONCLUSIONS OF LAW

1. Plaintiff carries the initial burden of showing action by the employer which can be inferred, if it is unexplained, to be discriminatory under the Civil Rights Act of 1964. *See Furnco Const. Corp. v Waters*, 98 S.Ct. 2943 (1978). In employment discrimination cases, plaintiff has the traditional civil litigation burden of establishing that the acts he complains of constitute discrimination in violation of Title VII. *See General Electric Co. v. Gilbert*, 97 S.Ct. 401 (1976).

We conclude that plaintiff did not prove by a preponderance of the evidence that his layoff was motivated in any part by racial factors.

2. The Court further finds that the testimony offered by defendant regarding the layoff and subsequent available work establishes the sufficient proof of justification reasonably related to defendant's legitimate goal of using experienced painters and reducing his work force prior to the slow season.

3. On the first issue, then, the Court finds that the defendant did not discriminate against plaintiff in violation of Section 703 of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e(2), or 42 U.S.C. § 1981.

4. The law concerning reprisal and retaliation is governed by section 704(a) of Title VII. It provides protection against reprisal or retaliation because an individual:

(a) Opposes any practice made an unlawful employment practice by Title VII, or

(b) Makes a charge, testifies, assists or participates in any manner in an investigation, proceeding, or hearing under Title VII.

These two clauses of Section 704(a) are commonly known as the opposition clause and the participation clause. It is important to distinguish between these two clauses because the case law is significantly different for each.

Plaintiff has brought this case under the participation clause since it is his contention that defendant has refused to employ him because he filed a charge of race discrimination against defendant.

5. Section 704(a) prohibits an employer from retaliating because an employee assists or participates in any manner in an investigation under Title VII.

Plaintiff's activities clearly fall within the ambit of protected activity. *EEOC v. Kallir, Phillips, Ross, Inc.*, 401 F.Supp. 66, pp. 71-72 (S.D. N.Y. 1975); *Pettaway v. American Cast Iron Pipe Co.*, 411 F.2d 998 (5th Cir. 1969).

6. Most importantly, it is not necessary that the validity of the underlying race discrimination charge be proved in order to make out a case of retaliation. *See Sutton v. National Distillers Products Company*, 445 F.Supp. 1319, 1327-28 (S.D. Ohio 1978).

An employer's action against an employee need not be based solely on the fact that the employee has filed a charge of discrimination for a retaliation claim to be made out. As the Court noted in *Kallir, supra:*

> Even if the Defendant was in part motivated by this incident, the Court's finding that its decision was also motivated by unlawful factors makes the suspension illegal. (At 72, n17.)

Nor need the charge of discrimination be made with the EEOC before retaliation is prohibited by Title VII. A charge with a State Agency, such as the Ohio Civil Rights Commission, is equally protected. *See Kallir, supra.*

7. Statements of Mr. Miller to EEOC investigators, at his deposition, and at trial, clearly establish that he retaliated against plaintiff for filing the charge with the OCRC by not calling plaintiff back to work in April 1974. In fact Mr. Miller clearly stated that plaintiff would likely be

working at defendant's company today had he not filed the charge of race discrimination.

8. Defendant admits that plaintiff was not discharged or laid off for poor quality work. There has been no evidence that plaintiff's participation in the investigation of his charge of race discrimination was anything other than proper.

CONCLUSION AND ORDER

The Court therefore finds that defendant has retaliated against plaintiff in violation of Section 704(a) of Title VII. Damages shall be calculated from April 1, 1974. The trial of this matter, however, concerned only the issue of liability.

IT IS THEREFORE ORDERED that plaintiff file an affidavit regarding damages within twenty (20) days of this order.

IT IS FURTHER ORDERED that defendant file whatever objections it has to plaintiff's affidavit within ten (10) days of its receipt of that affidavit. The Court will then set the matter for hearing if objections are filed. If no objections are filed, the Court will issue its judgment.

IT IS FURTHER ORDERED that no judgment will be entered at this time, but that judgment will be entered following the determination of damages on the issue of defendant's retaliation. The purpose of this order is to avoid the filing of several judgments in this matter.

J. VINCENT AUG, JR.

United States Magistrate

APPENDIX C
United States District Court
Southern District of Ohio
Western Division

TAYLOR HUGHES,

Plaintiff,

vs.

EARL B. MILLER CO.,

Defendant.

Civil No. C-1-77-672 (H) (A)

Order on Damages

Filed January 20, 1981

After a trial on the merits the Court held defendant liable to plaintiff under Section 704(a) of Title VII of the Civil Rights Act of 1964 (Doc. 22). A separate hearing was held on the question of damages on December 9, 1980 after which the Court ruled that plaintiff is entitled to back pay for a period running from April 1, 1974 through October 31, 1976. That figure, agreed upon by stipulation (Doc. 23, attachment A) was to be reduced by plaintiff's earnings during that period as testified to by plaintiff at the damages hearing. Also, the stipulated gross back pay was to be reduced by the amount of Welfare payments received by plaintiff during that time period.

The calculation for back pay damages is as follows:

Stipulated back pay from April 1, 1974 through October 31, 1976	$34,780.13
Less plaintiff's earnings for that period	5,388.51
Less Welfare payments for that period	12,474.00
TOTAL	$16,917.62

This Court also ruled that plaintiff was entitled to reasonable attorney's fees under Section 706(k) of Title VII, 42 U.S.C. § 2000(k). *See Albermarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975), *Hyland v. Kenner Products*, 13 FEP 1647 (S.D. Ohio 1976).

We find the approach taken by the Sixth Circuit in *Northcross v. Board of Education of Memphis City Schools*, 611 F.2d 624 (6th Cir. 1979) to be most helpful in our analysis of plaintiff's attorney's motion for fees.

In *Northcross*, the Court held

> The question as to whether the plaintiffs have prevailed is a preliminary determination, necessary before the statute comes into play at all. Once that issue is determined in the Plaintiff's favor, they are entitled to recover attorney's fees for "all time reasonably spent on a matter." The fact that some of that time was spent in pursuing issues on research which was ultimately unproductive, rejected by the Court, or mooted by intervening events is wholly irrelevant. So long as the party has prevailed on the case as a whole the district courts are to allow compensation for hours expended on unsuccessful research or litigation, unless the positions asserted are frivolous or in bad faith. 611 F.2d at 636.

Northcross further held that the hourly rate fixed by the Court should vary with the type of services provided as well as with the individual providing the services (attorney or paralegal, for example). The complexity of the case, whether it was taken on a contingent fee basis, as well as the experience, reputation, and ability of counsel should all be taken into account.

A conference was held with counsel and a few small stenographic errors in the affidavit regarding fees were corrected to the satisfaction of both parties. The result was an amended request for a total of $10,586.70 in fees.

Defendant was content to drop his request for oral argument on the motion and rest on his arguments set forth in his memo contra the motion for fees.

There can be no doubt that plaintiff is the prevailing party in this case. As there are no circumstances in this case which would mitigate against the award of attorney's fees, such fees should be awarded.

Under the reasoning of *Northcross, supra,* the fact that plaintiff proved retaliation but not discrimination, should not cause any reduction in the hours plaintiff's attorney is to be compensated for. In addition, it would be purely speculative for the plaintiff's attorney or the Court to come up with an allocation of plaintiff's attorney's time spent on one cause of action or the other. In addition, the Court in *Hyland, supra,* at 1651 noted that in a retaliation case, it is necessary for the attorney to investigate and present the facts concerning underlying charges of discrimination, since the retaliation does not occur in a vacuum. For this reason, the attorney should be compensated for this time.

The plaintiff's attorney charge of $50.00 per hour for out-of-court time and $60.00 per hour for in-court time and $5.00 per hour for law clerk time is certainly reasonable and below the customary charges of attorneys in this area for such cases. In addition, the charge of ten cents per page for copying is also a standard charge for such service.

For these reasons, plaintiff's Motion for Award of Attorney's Fees in the amount of $10,586.70 is granted.

Accordingly, the Court finds the defendant liable to plaintiff for back pay in the amount of $16,917.62 and for attorney's fees in the amount of $10,586.70, bringing defendant's total liability in this action to $27,054.32.

An entry of judgment reflecting the above amount will be filed simultaneously with this Order.

J. VINCENT AUG, JR.

United States Magistrate

APPENDIX D
United States District Court
Southern District of Ohio
Western Division

TAYLOR HUGHES,

Plaintiff,

vs.

EARL B. MILLER Co.,

Defendant.

Civil No. C-1-77-672 (H)(A)

Final Judgment

This action came on to be tried before the Court, and the evidence adduced by the parties having been heard and the Court having made its Findings of Act and Conclusions of Law (Doc. 22) and its Order on Damages (Doc. 29), it is

ORDERED, ADJUDGED AND DECREED that judgment is hereby granted in favor of plaintiff, Taylor Hughes, against defendant, Earl B. Miller Co., and that plaintiff, Taylor Hughes, recover of said defendant back wages in the amount of $16,917.62 with interest at the legal rate of 8% per annum from October 31, 1976 until paid.

In addition to the back wages, defendant is ordered to pay plaintiff his reasonable attorney's fees forthwith in the amount of $10,586.70; plus the costs of this action.

J. VINCENT AUG, JR.

United States Magistrate

Opposition

RECEIVED
MAY 15 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 81-1830

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1981

EARL B. MILLER AND COMPANY,

Petitioner

vs.

TAYLOR HUGHES

Respondent

RESPONDENT'S BRIEF IN RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JAMES H. FELDMAN, JR.
Attorney for Respondent
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Philadelphia, PN 19146

SUSAN SILVER BURGMANN
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QUESTIONS PRESENTED FOR REVIEW

1. Whether a possible split of authority between the Federal Circuit Courts of Appeals concerning proportionality of attorney's fees is inapplicable to a case in which the three issues presented were inextricably bound together in terms of legal preparation and presentation.

2. Whether the Supreme Court of the United States should deny the petition for a writ of certiorari because the proportionality question was not raised in the District Court and no record on the issue exists.

3. Whether the Supreme Court of the United States should avoid reviewing questions of fact decided below on the issue of mitigation of damages.

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Rules

Federal Rule of Civil Procedure 52(a).

STATEMENT OF THE CASE

In his Statement of the Case, Petitioner has failed to mention certain facts.

First, with regard to the employment history of Respondent, Taylor Hughes, it is important to note that a damages hearing was held on December 9, 1980, and extensive evidence was received by the United States Magistrate for the Southern District of Ohio, Western Division, concerning Mr. Hughes' prior employment record. Evidence was introduced regarding the period from April 1, 1974, the beginning point for the calculation of damages set by the Court, to the date of trial. The trial court determined, upon analyzing the evidence, that the back pay period should terminate on October 31, 1976, when Mr. Hughes elected to go into business for himself. The Sixth Circuit Court of Appeals affirmed the trial court's decision on damages, apparently finding that Petitioner had not sustained its burden of showing the back pay award to be clearly erroneous.

In addition, on December 22, 1980, Respondent filed a motion for an award of attorney's fees. The motion was supported by a detailed affidavit of Respondent's counsel, delineating the hours spent preparing the case. Petitioner objected to the motion on the grounds that the hourly rate requested ($50 out of court time, $60 in court time, $5 law clerk time) was not reasonable and that the number of hours worked was not reasonable. The Court conferred with both counsel. A few small stenographic errors in the affidavit regarding fees were corrected so that the fee request was amended to $10,586.70. Petitioner withdrew his request for a hearing on the fee award, electing to rest upon the arguments contained in his memorandum in support of a Motion contra to attorney's fees. The Court awarded attorney's fees in the amount of $10,586.70. The Sixth Circuit Court of Appeals affirmed.

REASONS FOR DENYING WRIT

I. ANY SPLIT OF AUTHORITY BETWEEN THE FEDERAL CIRCUIT COURTS OF APPEALS CONCERNING PROPORTIONALITY OF ATTORNEY'S FEES IS INAPPLICABLE TO A CASE IN WHICH THE THREE ISSUES PRESENTED WERE INEXTRICABLY BOUND TOGETHER IN TERMS OF LEGAL PREPARATION AND PRESENTATION.

Petitioner asserts that the District Court's award of attorney's fees in this case must be "proportionate to the degree to which a Plaintiff has prevailed." (Petitioner's brief, p. 8). Petitioner's counsel sites this Court's granting of a writ of certiorari in Hensley v. Eckerhart, case number 81-1244, as support for his argument that certiorari should be granted here. Suggesting that Hensley presents precisely the same issue as is presented herein, Petitioner has failed to compare the facts of the two cases. Factual analysis reveals that in Hensley numerous separable, factual issues existed.

In the instant case, three issues were initially presented. The first argument was that Respondent had been laid off because of racial discrimination, the second was that Respondent had not been recalled to work because of racial discrimination, and the thirdwas that he had been retaliated against because he had filed a race discrimination complaint with the Ohio Civil Rights Commission. It is uncontraverted that Respondent prevailed in the significant retaliation claim. These three issues were inextricably bound together. It is well settled that in order to prove retaliation, the plaintiff must first make his prima facie case. The defendant, then, must come forward with a legitimate, non-discriminatory reason for its conduct toward the plaintiff. The plaintiff is next compelled to show that the defendant's purported legitimate reason is a pretext. Brown v. Rollins, 397 F. Supp. 571 (W.D. N.C. 1974). Clearly, any research, investigation, review, interviewing and trial preparation for one issue in this case would inevitably have overlapped substantially, if not completely, with that for the others. Counsel for the Respondent, in order to do his job properly, had to anticipate Petitioner's defenses and follow up every potential line of defense. He had to explore, investigate and prepare for possible non-discriminatory reasons for the conduct of Petitioner toward Respondent. Respondent was compelled to demonstrate the lack of legitimate explanations for Petitioner's retaliatory conduct, and counsel had to foresee pretextual reasons and prepare to refute them. A working knowledge of the entire employment picture was essential. In Hyland v. Kenner Products Co., 13 FEP

1647 (S.D. Ohio 1976), the court faced a situation identical to this one in that the Respondent won on a retaliation claim but lost on a discrimination claim. The court found that, in a retaliation case, it is necessary for the attorney to investigate and present the underlying charges of discrimination because the retaliation does not occur in a vacuum. Presenting a retaliation claim in context requires a detailed record pre-dating the civil rights complaint or charge. 13 FEP Cases at 1651-1652 . The same sound reasoning applied to this case, leads to the conclusion that time spent on the Respondent's discrimination claim was necessary in order to prove the retaliation claim and should be compensated.

Hensley v. Eckerhart, case number 81-1244, is, as previously noted, readily distinguishable from the case at bar. The petition for certiorari was brought by the Attorney General of the State of Missouri. Petitioner therein contested an award of $133,333.25 in attorney's fees, claiming the fees "should have been proportioned so as to reflect accurately the relative success of the parties, especially in light of the magnitude of fees awarded." (Attorney General of Missouri's petition for certiorari, p. 12). Two distinctions between Hensley and the case at bar arise immediately. First, the magnitude of the fee in this case is far from striking and, second, this case does not involve a state government.

Perhaps most significantly, the Petitioner in Hensley stated: "To be generous to the plaintiffs, their attorneys were successful on substantially less than one-half of their separable and individual factual contentions respecting allegedly unconstitutional conditions at the Forensic Unit, Fulton State Hospital." (Emphasis added.) Petitioner went on to state that plaintiffs received no relief at all on their principle contention. (Attorney General's petition for ceriorari, p. 13). In contrast, then, to the virtually indivisible issues in the case at bar, the issues in Hensley dealt with separate factual matters, such as medication policies, the use of seclusions and restraints and the number of staff assigned to the Forensic Unit of the Fulton State Hospital. (Attorney General's petition for certiorari, p. 9).

Petitioner herein cites cases from several circuits in an effort to bolster his argument that certiorari should be granted in this case, and that this case is reflective of a split of authority between the Circuit Courts of Appeals. As with Hensley, however, factual distinctions are numerous and significant.

Petitioner states that Nadeau v. Helgemoe, 581 F 2d 275 (1st Cir. 1978) is in accord with his contention that attorneys fees should be awarded proportionately. In fact, the case does hold that the amount of fees should be based on work performed on successful [illegible]. However, factually, the case is much more akin to Hensley than is the case at bar. It is a prisoners' rights case. As in Hensley, numerous issues were presented concerning conditions in a state institution. Plaintiffs prevailed in their argument that they should have expanded access to library facilities. The Court of Appeals felt that the library issue was enough of a success to term plaintiffs a prevailing party, but that "it by no means could be said to have dominated the litigation." Nadeau at 279. Issues in Nadeau were separable and factual and did not evolve from a particular sequence of interrelated events.

Also cited in support of the petition for certiorari was Hughes v. Repko, 578, F2d 483 (3rd Cir. 1978). Hughes involved a housing discrimination claim against two defendants and held that attorneys fees should be awarded to the prevailing party for hours of legal service "reasonably supportive" of successful claims. The case clearly states, though, that hours of labor may be supportive of more than one claim in a given lawsuit. The court stated:

> Implicit in our analysis is the recognition that legal services fairly devoted to successful claims are compensable even though those very same legal services also supported the prosecution of the unsuccessful claims. In this case, for example, many of the same legal services required to prosecute the several claims against the two defendants might have been required in any event had the plaintiffs chosen only to pursue the claim that did prove successful, i.e., the §1982 claim against defendant, Mrs. Repko, consequently, an unanalyzed allocation of hours will not be permissible in arriving at the lodestar.

Hughes at 487.

As Petitioner has noted, the court in Morton v. Charles County Board of Education, 373 F. Supp. 394 (D Md. 1974); affirmed 520 F2d 871 (4th Cir. 1974) said that a consideration in arriving at appropriate attorneys fees is the extent to which plaintiffs were successful and that "time spent on unsubstantiated claims should not be compensated." (Petitioner's brief, p. 10) The court was careful to note in this school desegretation matter that the limited success obtained by the plaintiffs distinguished the case from other attorney award cases, Morton at 412. The court also pointed out that:

> A considerable amount of the evidence offered by plaintiffs was of little weight; but the presentation of such evidence required defendants to answer it, and placed large burdens of time and expense on defendants, which will have to be borne by the citizens of Charles County, black and white, in the shape of higher taxes or less services or both.

Morton at 411.

Finally, the Morton court remarked that an hourly attorneys fee rate applied to all of the hours expended by plaintiffs' counsel would not be proper because much of the time was spent on claims which were not established and which were clearly without merit. Certainly no analogy may be drawn between the presentation of issues clearly without merit in Morton and claims made by Respondent in the District Court.

In another prisoner's rights case, Gurule v. Wilson, 635 F2d 782 (10th Cir., 1980), the Tenth Circuit stated:

> A technical dissection of the course of litigation and a mechanical proportionate reduction of the total fee is not in keeping with either the express intent of Congress or the broad remedial purposes of the Civil Rights Acts. Where the "issue was all part and parcel of one matter counsel should not be penalized for every lost motion." Lamphere v. Brown University, 610 F 2d 46, 47 (1st Cir. 1979). Of course, attorneys fees should not be awarded for issues that are frivolous or asserted in bad faith.

Gurule at 793-794. Petitioner has not even contended that Respondent asserted issues frivolously or in bad faith. Nor has it provided a framework under which the time for preparation of Respondent's three claims may be readily dissected. Such a dissection is simply not possible because of the interrelationships of the claims and the necessity of presenting them in context. Here, indeed, the issues were "all part and parcel of one matter."

An approach comparable to the reasonable one used in Gurule was advocated by the Fifth Circuit in Jones v. Diamond, 636 F 2d 1364 (5th Cir. 1981). The Jones court noted the tendency of issues in complex civil rights litigation to overlap and intertwine, and advised that adequate representation necessitates exploration of every aspect of the case by the attorney. Like other courts, the Fifth Circuit stated that time spent on unsuccessful claims clearly without merit should not be compensated. It disdained the idea, however, that time spent on unsuccessful claims should automatically be disallowed. The court stated:

> Instead the court must consider the relationship of the claims that resulted in judgment with the claims that were rejected and the contribution, if any, made to success by the investigation and prosecution of the entire case.

Jones at 1382.

In Northcross v. Board of Education of Memphis City Schools, 611 F2d 624 (6th Cir. 1979) the Sixth Circuit made its position eminently clear. It held that as long as a party had prevailed on a case as a whole, the district court should award compensation for hours reasonably expended on unsuccessful preparation, research and litigation unless the claims were asserted in bad faith or were frivolous.

The basis of Petitioner's argument that a writ of certiorari should be granted in this case is a conflict between Federal Courts of Appeals with regard to the concept of proportionate attorneys fees. Respondent respectfully submits that even if, arguendo, such a conflict exists, it is simply not applicable to a case such as the one at bar, where the issues were inextricably bound together in the trial court, and any effort to separate them for the purpose of awarding proportionate fees would be fruitless and would defeat the purpose of legislation awarding attorneys fees in civil rights cases.

II. IN ASSERTING THE PROPORTIONALITY ISSUE THE PETITIONER IS ASKING THE COURT TO DECIDE A QUESTION THAT WAS NOT RAISED IN THE DISTRICT COURT, AND ON WHICH THERE IS NO RECORD.

This Court has historically granted writs of certiorari in cases whose decisions will have far-reaching implications for many people. This careful use of discretion necessitates the selection of cases whose facts paint a clear picture of the issues presented.

In the instant case, counsel for etitioner waived his right to a hearing on the issue of attorneys fees in the District Court. As a result, there is no record below on the proportionality question. Clearly these are not ideal circumstances under which this Court should accept a case on the proportionality of fees.

For this reason, Respondent respectfully submits that a Writ of Certiorari should not be granted.

III. THE DISTRICT COURT WAS CORRECT WHEN IT FOUND THAT RESPONDENT HAD MITIGATED HIS DAMAGES, AND THE SIXTH CIRCUIT WAS CORRECT IN AFFIRMING THE FINAL JUDGMENT OF THE DISTRICT COURT.

In challenging decisions of the courts below on mitigation of damages, Petitioner is challenging findings of fact. It is uniformly settled that the calculation of interim earnings and the determination of whether the discriminatee exercised reasonable diligence in seeking iterim employment are both questions of fact under Federal Rule of Civil Procedure 52(a). In order to tamper with the District Court decision, the Sixth Circuit would have had to find the decision clearly erroneous. Rolfe vs. County Board of Education, 9 FEP Cases 1111 (6th Cir. 1968). It did not so find. In Albamarle Paper Company v. Moody, 422 U.S 405 (1975), this Court cautioned Courts of Appeals reviewing back pay awards to recognize that "the trial court will often have the keener appreciation of those facts and circumstances peculiar to particular cases. Albamarle at 421.

Respondent presented detailed evidence below concerning his employment history and his efforts to obtain employment. Recently, in Spiva v. Copperweld Steel Company, 22 FEP Cases 900, 912 (N.D. Ohio 1980) the court found that "Plaintiff's uncontradicted testimony that he diligently pursued other avenues of potential employment but was unsuccessful" was sufficient evidence of mitigation so that no reduction of the back pay award was warranted." Petitioner in the case at bar presented no evidence contradicting that of Respondent on the mitigation issue.

Respondent requests that this Court respect traditional standards of review and not second-guess the findings of the courts below on the factual questions of mitigation of damages.

CONCLUSION

For the foregoing reasons, the Respondent respectfully submits that the petition for a Writ of Certiorari should be denied.

Respectfully Submitted,

JAMES H. FELDMAN
Attorney for Respondent
9 C.C.C.O.
2208 South Street
Philadelphia, PN 19146

SUSAN SILVER BURGMANN
22 West Ninth Street
Cincinnati, OH 45202
(513) 721-7500

CERTIFICATE OF SERVICE

STATE OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } ss:

Comes now James H. Feldman, Jr., who having been duly cautioned and sworn, deposes and says as follows:

I served a copy of the foregoing Respondent's Brief in Response in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit upon counsel for Petitioner, Douglas Leigh by depositing same in a U.S. post office mail box with first class postage pre-paid and addressed to:

Douglas Leigh
37 East Seventh Street, Suite 700
Cincinnati, Ohio 45202

this 14 day of May, 1982.

James H. Feldman, Jr.

Sworn to before me and subscribed to in my presence this 14 day of May, 1982.

CHARLOTTE A. YOUNG
Notary Public, Phila., Phila. Co.
My Commission Expires Nov. 5, 19

RECEIVED
MAY 15 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

EARL B. MILLER & COMPANY : CASE NO. 81-1830

Petitioners :

vs. : MOTION

TAYLOR HUGHES :

Respondent :

Motion for Leave of Court to
Proceed in Forma Pauperis

Comes now the Respondent, Taylor Hughes, by and through counsel, and hereby moves the Court pursuant to Supreme Court Rule 46, for leave to proceed in forma pauperis. In support of this Motion, Respondent attaches his Affidavit of indigency. Leave to proceed in forma pauperis was not sought below.

Respectfully Submitted,

JAMES H. FELDMAN, JR.
Attorney for Respondent
C.C.C.O.
2208 South Street
Philadelphia, Pennsylvania 19146

SUSAN SILVER BURGMANN
Attorney for Respondent
22 W. 9th Street
Cincinnati, OH 45202
(513) 721-7500

CERTIFICATE OF SERVICE

STATE OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } ss.:

Comes now James H. Feldman, Jr., who having been duly cautioned and sworn, deposes and says as follows:

I served a copy of the foregoing Motion for Leave of Court to Proceed in Forma Pauperis, along with attached exhibit upon counsel for Petitioner Douglas Weigle by depositing same in a U.S. post office mail box with first class postage affixed and addressed to:

Douglas Weigle
35 East Seventh Street, Suite 700
Cincinnati, Ohio 45202

this 14 day of May, 1982.

James H. Feldman, Jr.

Sworn to before me and subscribed to in my presence this 14 day of May, 1982.

CHARLOTTE A. YOUNG
Notary Public Phila., Phila. Co.
My Commission Expires Nov. 5, 1985

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

EARL B. MILLER & COMPANY	:	CASE NO. 81-1830
Petitioners,	:	
vs.	:	AFFIDAVIT
TAYLOR HUGHES	:	
Respondent	:	

Affidavit in Support of Motion to Proceed
in Forma Pauperis

I, Taylor Hughes, being first duly sworn, depose and say that I am the respondent in the above-entitled case; that in support of my motion to proceed in forma pauperis to respond to petitioners' petition for a writ of certiorari, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor.

I further swear that the following information relating to my poverty is true.

1. I was self-employed as an exterminator until February, 1981, when my license expired. My business was called CHEA-PEST CONTROL and my income was approximately $225.00 a month.

2. I have not received, within the past 12 months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source.

3. I have no cash, checking or savings account.

4. I own no real estate, stocks, bonds, notes, automobiles or other valuable property.

5. My wife and six of our eight children are dependant upon me for support. We currently receive Welfare benefits of $424.00 per month. My wife receives disability benefits.

I understand that a false statement in this Affidavit would subject me to penalties for perjury.

Taylor Hughes
TAYLOR HUGHES

SUBSCRIBED AND SWORN TO before me this 10 day of May, 1982.

Fredric F. Tilton
FREDRIC F. TILTON, Attorney at Law
Notary Public, State of C-
My Commission has no expira-
Section 147.03 R. C.